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7 BEFORE THE INSURANCE COMMISSIONER  
8 OF THE STATE OF WASHINGTON

9 In the Matter of the Application  
10 regarding the Conversion and  
11 Acquisition of Control of Premera Blue  
12 Cross and its Affiliates.

No. G 02-45

PREMERA'S EMERGENCY MOTION  
FOR MODIFICATION OF  
FOURTEENTH ORDER

13 On September 30, 2003, the Commissioner entered his Fourteenth Order: Ruling  
14 on Interveners' Request to Revise Case Schedule. The Commissioner denied the motion  
15 of the Intervenor to revise the case schedule set forth in his Thirteenth Order. The  
16 Commissioner then ordered the OIC Staff to "produce its draft consultant reports and  
17 executive summaries to the Intervenor on October 3, 2003, when they are produced to  
18 Premera." Premera is deeply concerned about this directive to the OIC Staff. Although  
19 the Commissioner was, we believe, seeking to protect the confidentiality of Premera's  
20 proprietary information, the best if not the only way to achieve that goal is to make sure  
21 that the Protective Order applies to the documents when they are released to the  
22 Intervenor. The Protective Order will not apply unless the Fourteenth Order is modified.

23 The Eighth Order provides on page 6, lines 12-16, that the procedures set forth in  
24 the Protective Order are to "be followed with respect to information, documents, or other  
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PREMERA'S EMERGENCY MOTION FOR  
MODIFICATION OF FOURTEENTH ORDER - 1

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1 things obtained via document requests, subpoenas, depositions or other discovery methods  
2 in this Matter.” The Intervenors have not, to date, served any document requests or other  
3 discovery seeking production of the draft reports of the OIC consultants. Therefore,  
4 production of these reports by the OIC Staff on October 3, 2003, **would not** be governed  
5 by the Protective Order and accompanying confidentiality agreements between the  
6 Intervenors and Premera.<sup>1</sup>

7 Even if the draft consultant reports were considered to be somehow covered by the  
8 Protective Order, the Protective Order by its terms protects only information that has been  
9 designated “Confidential Information” or “Attorneys’ Eyes Only Information.” The  
10 Protective Order contemplates that the party whose confidential information is sought will  
11 have an opportunity to designate it as such. Premera has not yet seen the draft consultant  
12 reports or had such an opportunity. Only after the draft reports are submitted to Premera  
13 on October 3 will Premera be able to review them and determine which portions contain  
14 Premera’s confidential and proprietary information. That must happen before the  
15 documents can be protected under the Protective Order.

16 The directive to the OIC Staff set forth in the Fourteenth Order appears to be  
17 inconsistent with the confidentiality provisions of the Holding Company Act. RCW  
18 48.31C.130 provides, in pertinent part, as follows:

19 Confidential proprietary and trade secret information provided to the  
20 commissioner under RCW 48.31C.020 through 48.31C.050 and RCW  
21 48.31C.070 are exempt from public inspection and copying . . . . This  
22 information shall not be made public by the commissioner . . . or any other  
person, except to insurance departments of other states, without the prior  
written consent of the health carrier to which it pertains unless the  
commissioner, after giving the health carrier . . . notice and hearing under

23 <sup>1</sup> Premera’s Response to Intervenors’ Motion for Reconsideration, discussed on page 2 of  
24 the Fourteenth Order, suggested (a) discovery requests from Intervenors to Premera  
25 seeking the draft consultant reports and (b) a response by Premera on October 13 [not 3],  
2003. Because the Intervenors did not follow Premera’s suggestion, the circumstances in  
which the Protective Order would come into play remain hypothetical.

chapter 48.04 RCW, determines that the interest of policyholders, subscribers, members, shareholders, or the public will be served by the publication, in which event the commissioner may publish information related to the transactions or filings in the manner and time frame he or she reasonably deems appropriate and sensitive to the interest in preserving confidential proprietary and trade secret information.

The Commissioner may believe that directing disclosure to the Intervenors is different from making the information public. Indeed, the Fourteenth Order recites that the draft reports and their content “shall not be made public by the parties.” The Intervenors, however, include 17 organizations with tens of thousands of members, among them multitudes of providers that contract with Premera. There is no restriction under the Fourteenth Order upon the Intervenors’ disseminating confidential and proprietary information contained in the draft consultant reports to all of them. The resulting harm is precisely that which RCW 48.31C.130 was designed to prevent.

The solution to these myriad problems is straightforward. First, rather than the OIC Staff being ordered to turn over the draft reports to them on October 3, the Intervenors should be directed to serve Premera with a Request for Production of the draft reports and executive summaries of the OIC consultants. If they do so, the documents can be produced by Premera under the terms of the Protective Order, with confidential and proprietary information appropriately designated as “Confidential Information” and “Attorneys’ Eyes Only Information.” Second, Premera should be required to respond to the Request for Production by October 10, 2003. Although markedly shorter than the 30 days allowed for a response under the Civil Rules, this should be sufficient time for Premera to review the documents and make designations under the Protective Order. Third, if the Intervenors would be prejudiced in any way by one week’s delay in their receiving the draft reports of the OIC consultants—notwithstanding that the Intervenors have already interviewed the States’ consultants and that they would still have 30 days

PREMERA'S EMERGENCY MOTION FOR  
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1 after October 10 to meet the November 10 deadline for submission of their final expert  
2 reports—the November 10 deadline could be extended by one week, to November 17,  
3 2003.

4 Attached are a draft Request for Production and Fifteenth Order designed to effect  
5 this proposed solution.

6 DATED this 2nd day of October, 2003.

7 Respectfully submitted,

8 PRESTON GATES & ELLIS LLP

9  
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PREMERA'S EMERGENCY MOTION FOR  
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